EXHIBIT F

IN THE HIGH COURT OF JUSTICE No 1088
QUEEN'S BENCH DIVISION

Court No 1

COMMERCIAL COURT
St Dunstan's House
133-137 Fetter Lane
London EC4A 1HD

16th April 2003
APPROVED JUDGMENT

Before:

THE HONOURABLE MR JUSTICE TOMLINSON

BETWEEN:

Kensington International Limited
Claimant

-v-

Republic of the Congo
Respondent

Mr Ewan McQuater (instructed by Jones Day Gouldens) appeared on behalf of the Claimant.

Mr Khawar Qureshi as Advocate to the Court (appointed by the Attorney General)

Wednesday, 16 April 2003

(2.00pm)

Judgment of MR JUSTICE TOMLINSON

MR JUSTICE TOMLINSON: The claimant is a company incorporated in the Cayman Islands. It deals in secondary debt. It trades securities on inter-dealer markets. It does so with the benefit of a line of credit guaranteed by its parent. Apparently the identity of the parent, by whom the claimant is wholly owned, is commercially sensitive. It has been redacted from the independent auditor's report dated 21st March 2003, placed before the court.

The claimant sues as assignee of all right, title and interest in $11,999,999.80 due under a Loan Agreement dated 18th April 1984, pursuant to which the defendant state, to which I shall refer as "Congo, "was the borrower. The lenders were 11 banks. They are B.A.I.I. plc, International Westminster Bank plc, Standard Chartered Bank plc, Banque Paribas (London), Al Saudi Banque (London), Société Générale (London branch), Williams and Glyn's bank plc, Middle East Bank Limited, Banque Belge Limited, Banque Belgo-Zairoise du Zaire

S.A, and Algemene Bank Nederland N.V.

The Loan Agreement was in respect of a loan of up to $13.5 million. I do not know if the entire facility was drawn down.

The first repayment of principal, one-ninth of the whole, was due six months after the date of the agreement. I am told that some interest may have been paid in 1984 but no principal has apparently ever been repaid and no interest paid, certainly, since 1985.

The claimant acquired its interest pursuant to four assignments. The first in time is dated 29th December 2000, the assignor was Westgate International LP and the amount assigned was $6,876,622.30, together with all accrued and unpaid interest.

The second assignment in time was 22nd March 2001. The assignor was the International Bank of Miami NA. The amount assigned was $1,623,377.50, together with all unpaid and accrued interest.

The third assignment is dated 11th April 2001. The assignor was Salomon Brothers Holdings Company Inc. The amount

assigned was $1 million, together with all unpaid and accrued interest.

The fourth assignment is dated 19th April 2001. The assignor was FH International Financial Services, Inc. The amount assigned was $2.5 million, together with all unpaid and accrued interest.

It is to be observed that none of those assignors is an original party to the Loan Agreement. Each of the assignments is subject to the standard terms for assignments of loan assets as amended from time to time of the Emerging Markets Traders Association, the terms of which are incorporated by reference into the assignments. I have not been shown those terms. I do not know through how many hands these loan assets passed before finding their way to the claimant. Equally, I do not know what was the consideration furnished by the claimant for each of the assignments. Apparently that, too, is commercially sensitive. At any rate, I have not been told about it, notwithstanding that I had expressed the view that it might be relevant to the exercise of my discretion, since I am asked to

balance relevant hardship in the event that I do or do not grant the relief claimed.

This action was begun on 14th October 2002. The defendant has neither acknowledged service nor taken any part in the proceedings. Steps have been taken to ensure that the defendant is aware of the proceedings and of the applications that have been made, first, before Cresswell J on 20th December 2002, and now before me on 14th and 15th April 2003. I should be very surprised if the defendant is not aware of the proceedings and of the applications, or rather of the trial, since that is what has now occurred before me.

On 20th December, 2002, the matter came before Cresswell J on an application for summary judgment. The claimant sought an order to the following effect:

1. The defendant to pay the claimant the sum of $56,047,443.31 together with the further sum of $538,137.12 in respect of interest from 13th September 2002 to 12th November 2002, and interest thereafter as per the terms of paragraph 7D of the particulars of claim.

2. Save as provided for in paragraph 3 below, the defendant be restrained, whether acting by itself, its servants or agents, including but not limited to SMPC or any other Congolese public entity or otherwise howsoever, from making or causing or procuring to be made any payments to creditors other than the claimant.

3. The defendant be permitted to make payments or to cause or procure payments to be made to creditors other than the claimant, provided that, at the same time as any such payment is made, the defendant makes or causes to be made a pro rata payment to the claimant.

4. The defendant be restrained, whether acting by itself, its servants or agents including but not limited to SNPC or any other Congolese public entity or otherwise howsoever, from creating any mortgage, pledge or other security or other preferential arrangement over any of the assets or revenues of the defendant or of any Congolese public entity including but not limited to SNPC in favour of any creditor.

The claimant further sought a declaration that, 5, in carrying out the acts identified in

paragraphs 11 to 27 of the particulars of claim, the defendant has acted in breach of the provisions of clause 9(d) of the April 1984 Loan Agreement.

The order sought went on to contain a definition section for the purposes of the order pursuant to which, for example, a definition was given of what was meant by a pro rata payment.

That was a somewhat optimistic application, bearing in mind that it was estimated that the hearing would take only an hour or an hour and a half. Cresswell J, whose experience in these matters is very great, plainly regarded the injunctive relief sought as novel and unprecedented. He plainly also regarded as striking the seeking of such relief in December 2002 by an assignee, not an original party, in circumstances where the first event of default under the Loan Agreement occurred in 1984, and the claimant had not acquired any interest until the very end of the year 2000. To that I might add that the loan should have been fully repaid by the end of 1988.

Cresswell J granted summary judgment on the money claim. He directed a speedy trial of the remaining issues, principally the question whether the claimant is entitled to the injunctive relief claimed. That depends, in part, upon the meaning and effect of Clause 9(d) in the Loan Agreement, which is an undertaking by the borrower "to procure that the claims of all other parties under this agreement will rank as general obligations of the People's Republic of the Congo, at least pari passu in right and priority of payment with the claims of all other creditors of the People's Republic of the Congo, and not to create or allow to subsist any mortgage pledge or other security or other preferential arrangement over any of the assets or revenues of the People's Republic of the Congo, or of any Congolese public entity in favour of any creditor."

As to this, Cresswell J said:

"As to the second and third claims, both by way of negative injunction, the claims relying on the negative pledge clause and the pari passu clause, I suggested to Mr McQuater,

on behalf of the claimant, that in view of the importance and nature of these claims, the court would be assisted by the appointment of an amicus. Mr McQuater has very sensibly taken instructions from his client and the claimant now accepts that the second and third claims should proceed to trial."

Her Majesty's Attorney General has appointed Mr Qureshi to assist the court. I am extremely grateful to him for the assistance he has rendered.

I must refer briefly to certain other passages in the judgment of Cresswell J given on that occasion. He began his judgment in this way:

"This is the hearing of an application by the claimant, Kensington International Limited, for summary judgment under CPR part 24. Kensington is the assignee of all right, title and interest in sums totalling $11,999,999.80, said to be due and owing from the defendant, the Republic of the Congo, under the terms of a Loan Agreement dated 18th April 1984. These amounts, together with interest, have been outstanding for a long time and remain unpaid.

"2. Under Clause 19.1-4 of the Loan Agreement, the Republic of the Congo submitted to the jurisdiction of this court and waived immunity from suit and from execution against its property. I refer to the full terms of Clause 19. The Republic of the Congo has, according to the first witness statement of Mr Stephen Pearson, been duly served in accordance with the provisions of clause 19.2 of the Loan Agreement, and I so find. The Republic of the Congo has not acknowledged service.

"3. On 4th November this year, I gave the claimant permission to proceed by way of summary judgment under CPR part 24, not withstanding the defendant's failure to acknowledge service."

At paragraph 7, the judge continued:

"The claimant's assignments have been recorded by the agent under the Loan Agreement BNP Paribas, which has also reconciled the amounts due to the claimant as being a principal sum of $12 million together with interest of £44,047,443.31, making a total due as at that 12 December 2002, $56,047,443.31.

The claimant seeks judgment for this sum, together with further contractual interest up to 19th December 2002, in the sum of $864,548.16, calculated as set out in the particulars of claim. Thus, the total sum claimed is $56,911,991.47. BNP Paribas is also acting as reconciliation agent for the defendant in relation to the Loan Agreement and in that capacity, has fully reconciled Kensington's interest.

"8. Kensington claims the sum is due to it under the Loan Agreement in debt. The debt has been outstanding for a very considerable period of time and has been repeatedly tolled. The most tolling agreement is dated 22nd September 1997. That agreement expressly renounces any right to invoke any statute of limitation.

"9. The defendant has not appeared by solicitors or counsel today, although it has received a notice of this hearing.

"10. In my judgment, having considered the materials before the court, the defendant has no real prospects of successfully defending the claim. Accordingly I give judgment in

favour of the claimant in the sum of $56,911,991.47."

I have read those passages, not only to set the scene, but also because it is said by Mr McQuater for the claimant that the judge's findings foreclose certain issues which the amicus has raised. The claimant has taken no steps to attempt to enforce its judgment. It has taken the view that Section 12 (5) of the State Immunity Act 1978 is applicable. That section provides:

"A copy of any judgment given against a state in default of appearance shall be transmitted through the Foreign and Commonwealth office to the Ministry of Foreign Affairs of that state, and any time for applying to have the judgment set aside, whether prescribed by rules of court or otherwise, shall begin to run two months after the date on which the copy of the judgment is received at the ministry."

Also thought to be possibly relevant is CPR 40.10. That rule provides:

"Where the claimant obtains default judgment under Part 12 on a claim against the

state where the defendant has failed to file an acknowledgement of service, the judgment does not take effect until two months after service on the state of (a) a copy of the judgment and (b) a copy of the evidence in support of the application for permission to enter default judgment, unless the evidence has already been served on the state in accordance with an order made under part 12."

The claimant has taken the prescribed steps, and the two month period is apparently about to expire. I rather doubt whether these provisions are applicable, since I doubt whether the summary judgment granted under Part 24 is properly to be regarded as a judgment in default of appearance or a default judgment. However, it was no doubt prudent for the claimant to proceed in the manner which it did.

There is no evidence before me and there was no evidence before Cresswell J to explain how the banks party to the Loan Agreement came to divest themselves of their interest. There is no direct evidence to the effect that those banks were unpaid. However there is evidence which supports the assertion that the debt

remains due, as Cresswell J has expressly found.

On 26th February 1988, Congo entered into a refinancing agreement. Annex A lists 60 original contracts, of which this Loan Agreement is number 33. The tolling agreement of 22nd September 1997, to which Cresswell J refers in his judgment, is addressed to the banks or financial institutions and their successors in title to which debts are owed under original contracts as defined in the refinancing agreement. I can probably infer from the fact that the debts were being traded that they remained unpaid when acquired by the claimant, as Cresswell J has inferentially found. There is evidence that nothing has been paid to the claimant.

I have already referred to clause 9(d) of the Loan Agreement. Pursuant thereto, the claimant seeks (a) specific performance of Congo's obligation under the April 1984 Loan Agreement not to create any mortgage, pledge or other security or other preferential arrangement over any of its assets or revenues in favour of any creditor, that to which it

refers as the negative pledge clause, and (b) specific performance of Congo's obligation under the Loan Agreement to pay its creditors on a pari passu basis, pursuant to what is called the pari passu clause.

The claimant seeks to enforce these clauses by way of injunctions to prevent their breach, and also seeks a declaration that, in carrying out certain acts, Congo has acted in breach of those clauses.

It will be recalled that in Clause 9(d), there is reference to what is described as a Congolese public entity. This is defined in Clause 1 of the Agreement as: "An agency, authority, department, ministry or other instrumentality of Congo and any person directly or indirectly controlled or wholly owned by Congo or by a Congolese public entity".

Mr McQuater submits that the meaning of the prohibition in the negative pledge clause is clear and unambiguous. He submits that Congo has demonstrated a history, including a recent history, of non-compliance with the clause, creating securities and other

preferential arrangements over its assets, and thereby favouring selected creditors and discriminating against others. Unless restrained, it is suggested, Congo will continue so to do.

Mr McQuater goes on to submit that Congo has demonstrated that it has no intention of paying its ordinary creditors, such as those under the April 1984 Loan Agreement. Mr McQuater stresses that the claimant seeks only to restrain future breaches of the clause, rather than seeking to undo past breaches. This approach, he submits, is just and proportionate and creates no material or disproportionate hardship to Congo or anyone else involved. Damages, he suggests, are likely to be an inadequate remedy for breach of the negative breach clause, since Congo plainly will do everything it can not to pay those damages.

I agree with Mr McQuater that the meaning of the negative pledge clause is clear. It is designed to prevent the defendant from granting security or other preferential interests over its assets, thereby reducing the pool of assets

available to creditors under the April 1984 Loan Agreement.

Mr McQuater submits that the evidence demonstrates that Congo has a long and demonstrable history of granting security and other preferential interests over its assets to favoured creditors. Usually, he suggests, these favoured creditors are involved with the defendant in the exploitation of its vast oil reserves. Often, it is suggested, these breaches of the negative pledge clause have been carried out on Congo's behalf by Societe de Nationale des Petrole du Congo, SNPC, the state oil company.

Mr McQuater submits, and I accept, that the evidence overwhelmingly shows that SNPC is a Congolese public entity for the purposes of Clause 1 of the April 1984 Loan Agreement. As Mr McQuater points out, for the purposes of these claims, this is as far as the claimant needs to go. However, Mr McQuater submits, and I agree, that the evidence in the case does, in fact, go further and demonstrates that SNPC is simply part of the Congolese state and has no existence separate from the state. That is

demonstrated by the Congolese legislation, which establishes SNPC and demonstrates that its purposes are to undertake the exploitation of Congo's oil reserves on behalf of Congo, to hold the state's oil related assets on its behalf and to represent the state in oil related matters. The by-laws of SNPC are to similar effect. It is financed by the state. Its function is to act on behalf of the state, it is under the financial and economic control of the state and its officers are government appointees.

In a recent decision of the French Court of Appeal, in the matter of SNPC v. Walker International Holdings Limited on 23rd January 2003, that court found in contested proceedings that SNPC was simply the alter ego of Congo, thereby affirming the decision at first instance to the same effect. On 29th January 2002, the Tribunal de Grand Instance, Paris reached a similar conclusion in favour of another creditor, Connecticut Bank of Commerce.

Furthermore, in a decision in the Grand Court of the Cayman Islands, in Walker v

Olearius, 13th August 2002, Graham J found it to be at least arguable, for the purposes of the freezing order which he was invited to make, that SNPC was controlled by Congo.

Mr McQuater relies upon four particular alleged breaches of the negative pledge clause. Firstly, he relies upon a transaction described as a hedged crude oil prepayment facility entered into in May 2002. Under this arrangement, SNPC has entered into an agreement for the forward sale of Congo's crude oil to a special purpose vehicle called Olearius Limited, which will make prepayments to SNPC of some $210 million.

The prepayments are funded by a facility from Standard Chartered Bank and other lenders, which Olearius is to repay quarterly from onward sales of crude oil. SNPC is the exclusive sales agent for 50 per cent of the oil. The remaining 50 per cent is on-sold to Vitol S.A. Shortfalls in repayments by Olearius are to be made up by deliveries of oil. The arrangements are guaranteed by Congo, which has granted the lenders a variety of security rights over its assets, including

Congo's rights to significant quantities of its crude oil. The lenders have also been granted security over the rights to receive the proceeds of the former purchase arrangement and over certain accounts used for the receipt of funds.

Next, Mr McQuater points to an agreement in May or June of 2002 whereby Congo and/or SNPC agreed with Société Générale a new pre-financing facility of some $250 million secured against Congo's oil production. Although details of that agreement are not before the court, it seems almost certain from the material which is that this is structured in much the same way as the hedged crude oil prepayment facility, to which I have already referred.

Then Mr McQuater points to an agreement made in June 1994 between Congo and the Canadian Imperial Bank of Commerce, under which various sums were to become due from Congo to CIBC, including payments due in 2001 and 2002. By a letter dated 29th June 1994, which accompanied the facility, Congo gave instructions for certain mining royalties to be

is not to be criticised for the delay which has occurred in applying for this relief. Against that, it has to be pointed out that it seems likely that Congo has been in continuous breach of this provision for at least 12 years and probably longer. Furthermore, there is the irony that the two substantial and recent breaches are constituted by arrangements to which Standard Chartered and Société Générale are party. They are both lenders under the original Loan Agreement to the extent of $2 million and $1 million respectively. This feature gives me serious pause for thought as to the appropriateness of the relief which I am asked to grant. It is not easy to evaluate the point without knowing the terms on which these two and other banks divested themselves of their interest and without knowing what relationship the consideration paid by the claimant bore to the size of the debt assigned.

Reverting to Mr McQuater's submissions, he goes on to suggest that it is apparent that Congo has no intention of paying ordinary creditors, such as those under the April 1984 Loan Agreement. He points to the fact that

that agreement was signed almost 18 years ago and that apparently no payments have been made thereunder since 1985.

In his decision in the Grand Court of the Cayman Islands, to which I have already referred, Graham J observed that Congo had paid not a cent to the judgment creditor in that case, who was another ordinary unsecured creditor of Congo, and furthermore, that it had evinced an intention never to pay if it could possibly avoid doing so.

Mr McQuater submits, on the basis of the evidence before the court, that despite its enormous oil wealth and relatively small population, Congo has become notorious for dishonouring debt obligations. This has been largely due, he suggests, to mismanagement and diversion of its oil revenues and unrecorded expenditure under political control. Apparently, in 2001, Congo produced an average of 262,000 barrels of oil per day, yielding export revenues of approximately $2.5 billion per annum. This in a country with fewer than 3 million people. Mr McQuater suggests, therefore, that Congo has available to it

a very considerable cash income from its oil production, but is plainly selective in how the money is spent.

Mr McQuater goes on to suggest that it is no coincidence that about half of Congo's debt is secured by oil, and it is that half which gets paid. Indeed, he suggests that Congo's practice of entering into pre-financing arrangements in relation to its oil sales appears to be cumbersome and uncommercial, with the sole distinct advantage being that these schemes place a priority lien on the country's future commercial income and thus seek to place it beyond the reach of existing creditors.

Furthermore, there is evidence before the court, apparently publicly available also on the Internet, to the effect that the legal structure of the large hedged crude oil prepayment facility, to which I have already referred, was deliberately selected by Congo and by its legal advisors in an attempt to prevent Congo's creditors from seizing oil in the hands of SNPC and to try to reduce the risk of action by Congo's creditors. This information emerges from a memorandum

apparently prepared for Congo, or for SNPC, in May of 2002 by Messrs Cleary, Gottlieb, Steen & Hamilton.

Mr McQuater submits that where a contract contains an express negative stipulation, breach of it may be generally be restrained by injunction, and in such cases, an injunction is normally granted as a matter of course. It is not, he suggests, in such cases necessary to show that damages would be an inadequate remedy, although an injunction might be refused if it would cause undue hardship or oppression. He submits that the scope of the injunction sought in this action in relation to the negative pledge provision is manifestly fair and proportionate in the circumstances, since the claimant seeks only an order restraining future breaches of the negative pledge clause, rather than seeking an order which would immediately force Congo to unscramble past security arrangements made with its creditors.

Furthermore, Mr McQuater submits that, although not a necessary requirement for relief under the negative pledge clause, it does in fact appear to be unlikely that damages for

breach of the clause would be an adequate remedy. This, he submits, is because of Congo's attitude towards its ordinary unsecured creditors and its obvious determination to ensure that there are no funds against which such claims can be enforced.

On the question whether the injunction sought in relation to the negative pledge would be of any practical benefit to the claimant, Mr McQuater submits that there is good reason to believe that service of notice thereof on third parties might achieve the claimant's purpose, which is, of course, payment to it of the judgment debt. In that regard, Mr McQuater points out that SNPC has a wholly-owned English subsidiary, Societe de Nationale des Petrole du Congo UK Limited, SNPCUK, with a London office. Congo and the SNPC plainly carry out a material part of their financial activities in the exploitation of their oil reserves in or through London and may well hold funds here. Standard Chartered Bank, the principal lender, agent and security agent under the hedged crude oil prepayment facility, is an English bank based in London.

Congo and the SNPC, submits Mr McQuater, have significant financial activities in other European Union jurisdictions where this court's judgments and orders should readily be recognised. The French decisions to which I have already referred arose out of apparently successful attempts by creditors of Congo to attach the assets of SNPC in France.

Mr McQuater also points to the fact that the parties to be notified under the security assignment relating to the hedged crude oil prepayment facilities are subsidiaries of major European oil companies and that Vitol, which purchases 50 per cent of the oil under the facility, is itself a Swiss company which trades in London through two English subsidiaries. Other lenders to Congo and the SNPC are plainly domiciled in the European Union, for example, Société Générale and WestLB. Mr McQuater submits that it is likely, therefore, that the injunction sought will have a serious effect on Congo's ability to continue to ignore its obligations under the April 1984 Loan Agreement.

Turning to the pari passu clause,

Mr McQuater submits that such clauses are common in unsecured term loan agreements. They generally state that the debt obligations of the borrower under the loan agreement are to rank pari passu and equally with all other present and future obligations of the borrower. The provision is, he suggests, a companion of the negative pledge clause, which regulates the future creation of security for the borrower's debts.

Mr McQuater points out that the effect of the pari passu clause, particularly in the context of sovereign loan agreements, has been the subject of considerable discussion and limited authority. There exists a debate as to whether the pari passu clause is (a) a sharing clause which compels the creditor to pay creditors on a pari passu basis, or (b) simply an agreement that the debtor will not create a class of debt or unsecured debt which ranks ahead of the debt created by the particular loan agreement. There is apparently no English authority directly in point.

Mr McQuater submits that the pari passu clause in the present agreement is plainly

a sharing clause, compelling Congo to pay the claimant on a pro rata basis when it pays other creditors. In this regard, Mr McQuater relies upon the following considerations:

First, there is little doubt about the literal meaning of the words "pari passu" in the clause. The Latin means "by equal steps". See also Webster's, "in or to an equal proportion", and Black's Law dictionary, "by an equal progress, equably, rateably, without preference".

Secondly, Mr McQuater suggests that insofar as English authority gives guidance, the decision in Bowen v Brecon Railway Company, 1867, Law Reports 3, Equity 541, strongly suggests that the pari passu clause means that money to be distributed should be distributed or paid on a pari passu basis. In that case, the statutes of a railway company provided that unsecured bonds issued by the company should be entitled to be:

"Paid without any preferences, one above the other, by reason of priority of date of any such bond or otherwise howsoever".

It was held that the relevant proceeds

were held in trust for the other debenture holders, so that they were paid pari passu.

Thirdly, Mr McQuater submits that this result is borne out by the particular and strong wording of the clause in the present case, which refers to the claims of the parties under the Agreement ranking as general obligations, at least pari passu in right and priority of payment, and I emphasise "and priority of payment" with the claims of all other creditors of Congo. Mr McQuater suggests that it is difficult to accord any sensible meaning to the emphasised words if payments are not to be made pari passu.

Mr McQuater points out that whereas in the context of corporate loans the competing construction to the effect that the pari passu clause only affects the ranking of debts may make some sense, it makes little sense in relation to a sovereign borrower. In the first case, the clause could preserve a creditor's ranking in an insolvency and ensure that in a liquidation or forced distribution of assets, all creditors, or at least all unsecured creditors, are treated equally. However,

Mr McQuater submits, in relation to a sovereign borrower, the clause must bear a different meaning. A state cannot be liquidated nor are there procedures for proration of government debts on a state bankruptcy. The clause, when it appears in a sovereign loan, must therefore provide some further protection to creditors to compensate for their inability to invoke insolvency procedures against the state. That protection should, he suggests, be an enforceable obligation on the state to pay creditors on a pro rata basis.

Mr McQuater also referred me to some authority which may have some indirect bearing on the point. There is an Australian authority, Merchant Bills Corporation Limited v Permanent Nominees Australia Limited, 1972 to 1973, Australian Law Reports 565, in which Gibbs J in the Australian High Court construed a pari passu obligation as requiring that stockholders be treated equally and that all should receive payment at the same rate of monies owing to them.

There is a decision of the United States District Court, Central Distinct of California,

in Red Mountain Finance v The Democratic Republic of Congo, dated 30th May 2001, in which Judge Real granted an injunction preventing the payment of the Democratic Republic's external debt unless the claimant also received a proportionate payment of debts owing to it at the same time. He also granted enforcement of the related negative pledge provision. I can, however, attach little weight to this decision since not only have no reasons for it been shown to me but it is also a case in which evidently there was no appearance by the state. It should be emphasised that the Democratic Republic of the Congo is not the defendant in this case.

Next, Mr McQuater refers me to a decision of the Court of Appeal in Brussels in September 2000 in the case of LP Elliott Associates, relating to injunctive measures to enforce payments of certain Peruvian foreign debt, in the course of which the court held that the pari passu clause required that the debt should be paid equally towards all creditors in proportion to their claim, and also that no creditor could be excluded from the payment of

this proportional part of the interest payments in issue. Again, I can give little weight to this latter decision, since it was made upon an ex parte application and the order was directed towards a bank and not towards the Peruvian state.

Mr McQuater submits that if the pari passu clause does bear the meaning contended for by the claimant, then it follows, firstly, that Congo has acted in breach of that clause in making preferential payments to creditors in each of the four transactions to which I have already referred above, and secondly, that the clause can and should be the subject of specific enforcement by way of injunction.

Again, Mr McQuater submits that damages for breach of this provision would clearly be an inadequate remedy. He submits, with some force, that it would be difficult to calculate the amount of the loss suffered by any one particular creditor of Congo by reason of the various payments which Congo has made in breach of the pari passu clause and, in any event, he suggests, the issue might prove to the academic, given the obvious determination of

Congo not to pay its debts.

Finally, he suggests that there would be no hardship or oppression to Congo or, indeed, to its other creditors, should they be required to be treated equally with the creditors under the 1984 Loan Agreement.

I should perhaps note in passing that, in relation to the pari passu provision, Mr McQuater derives no assistance from the current Encyclopaedia of Banking Law, in which, at paragraph 3418, there is a discussion concerning pari passu clauses in sovereign loan agreements. Here, the editors make the following observation:

"It should also be observed that the pari passu clause has nothing to do with the time of payment of unsecured indebtedness, since this depends upon contractual maturities. The undertaking is not broken merely because one creditor is, in fact, paid before another. In the case of a state borrower, the pari passu clause must bear a different construction, since a government cannot be liquidated, nor are there procedures for the pro ration of governmental debt on a state bankruptcy

equivalent to those contained in corporate bankruptcies. Hence, a statutorily enforced hierarchy on forced dissolution is not in point. It is suggested that a pari passu clause in state creditors is primarily intended to prevent the legislative ear-marking of revenues of the government, or the legislative allocation of inadequate foreign currency reserves to a single creditor and is generally directed against legal measures which have the effect of preferring one set of creditors over the others or discriminating between creditors at a time when the state is unable to pay its debts as they fall due.

"It is thought that mere contractual arrangements, as opposed to legislation, should not conflict with the pari passu clause of the type specified above. The question depends on the circumstances and the matter does not appear to have received judicial attention in England. Areas where contracts may be sufficient to come within the clause might include settlings and debt compromise agreements involving more than one creditor and entered into by a bankrupt state."

Recognising that that commentary is unhelpful to him, Mr McQuater nonetheless points out that the sample pari passu clause, to which reference is made a little earlier in the text than the passage which I have read, does not contain the critical priority of payment language upon which he here places such reliance.

Mr Qureshi made observations under seven broad heads. Firstly, he reminded me of Section 1 (2) of the State Immunity Act 1978, which provides:

"A court shall give effect to the immunity conferred by this section, even though the state does not adhere in the proceedings in question."

Mr Justice Mummery referred to and considered this provision in United Arab Emirates v Abdel Ghafar in 1995, Industrial Court Reports, page 65. At page 73, Mr Justice Mummery said this:

"The decision of this Appeal Tribunal in Senupta v Republic of India 183, Industrial Court Reports, 221, illustrates how seriously the court regards this obligation. [I

interpose to point out that that is the obligation under Section 1 (2) of the State Immunity Act.] In that case, the foreign state did not appear to take the point on jurisdiction. The court asked for the appointment of an amicus to assist it. If the court has a duty under statute to give effect to the immunity conferred, even though the state does not appear to claim it, that duty may be all the greater in the case where the foreign state has, as here, expressly taken the point of immunity.

The overriding duty of the court, of its own notion, is to satisfy itself that effect has been given to the immunity conferred by the State Immunity Act 1978. That duty binds all tribunals and courts, not just the court or tribunal which heard the original proceedings. If the tribunal in the original proceedings has not given effect to the immunity conferred by the act, then it must be the duty of the appeal tribunal to give effect to it by correcting the error.

Although Mr Qureshi did not raise the point, I am myself concerned as to the extent

to which it is legitimate to grant the relief sought in the light of section 13 (2)(a) of the State Immunity Act, which provides:

"Subject to subsection 3 and 4 below, (a) relief shall not be given against a state by way of injunction or order for specific performance or for the recovery of land or other property."

Subsection 3 provides:

"Subsection 2 above does not prevent the giving of any relief or the issue of any process with the written consent of the state concerned, and any such consent which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally that a provision merely submitting to the jurisdiction of the courts is not to be regarded as consent for the purposes of this subsection."

Mr McQuater suggests that the written consent of Congo is to be found in Clause 19.3 of the Loan Agreement. That provides:

"The borrower consents generally in respect of any suit, action or proceedings arising out of or in connection with this

agreement to the giving of any relief or the issue of any process in connection with any such suit, action or proceedings, including, without limitation, the making, enforcement or execution against any property whatsoever, irrespective of its use or intended use of any order or judgment which may be made or given in such action or proceedings."

Mr McQuater naturally relies upon the apparent width of this clause, in particular the reference to "any relief" and the words "without limitation". He may be right, although my concern remains that enforcement of the injunctive relief now sought could only be achieved by criminal or quasi criminal procedures, such as sequestration, to which, most assuredly, Congo has not consented. It may be, however, that considerations such as these should not preclude me from finding that a sufficiently unequivocal consent has been given to the granting of the injunctive relief.

Next, Mr Qureshi made observations concerning the efficacy of the alleged service of proceedings on Congo. Mr McQuater contends that my consideration of these points is

precluded by reason of an issue estoppel in relation thereto generated by the judgment of Cresswell J. I do not consider that that is the correct approach. Estoppel by judgment is a rule of evidence, see Chitty on Contracts, 28th Edition, Volume 1, at paragraph 26.10, and the cases there cited. It is founded upon the public interest in the finality of litigation rather than the achievement of justice between individual litigants. It cannot preclude the court having regard to a relevant consideration when asked to grant discretionary relief, particularly when the relief is highly unusual and invasive injunctive relief which is directed towards fettering the ability of a foreign sovereign state to exploit its natural resources.

Clause 19.2 of the Loan Agreement provides:

"The borrower hereby and irrevocably appoints the Law Debenture Trust Corporation plc, Estates House, 66 Gresham Street, London, EC2B 7HX, as its agent for service and process in any such suit, action or proceedings in England ... provided that if at any time the

People's Republic of the Congo maintains an embassy or consulate in London ... any process relating to proceedings arising out of or in connection with this agreement may be validly served on the borrower if served on the ambassador or consul general for the time being of the People's Republic of the Congo in London."

Also of relevance in this regard is Clause 7 of the Agreement. Clause 7 contains conditions precedent to the obligation of the banks to make the loan.

At 7(b)1, there is provision for the furnishing, as a condition precedent, of documents evidencing the appointment of the Law Debenture Trust Corporation plc as process agent in London for the purpose of the Agreement, and the acceptance of such appointment by the Law Debenture Trust Corporation, substantially in the form of Exhibit B.

Exhibit B contains a detailed letter in draft form addressed to the Law Debenture Trust Corporation, to be executed on behalf of the Congo. In particular, it contains instructions

as to what is to be done by the Law Debenture Trust Corporation upon receipt of the letter, and it also refers to the terms upon which the Law Debenture Trust Corporation shall act as agent for the Congo in relation to the agreement.

There is no evidence before the court either way as to whether this or, indeed, any other condition precedent was satisfied, but the Law Debenture Trust Corporation has no record of the Loan Agreement. When served with the documents in October 2002, the manager of the Service of Process Department replied to the claimant's solicitors:

"Thank you for your letter of yesterday's sate and its enclosures. We have no record of the April 1984 Loan Agreement and we would comment that it is not unusual for us to discover that agreements refer to us as process agent even though we were not contacted about them at the at the time of the execution. In these circumstances, we are unable to do anything with the documents sent with your letter of 14th October 2002."

Mr McQuater submits that Clause 19.2 of

the Loan Agreement is an independent, freestanding, irrevocable appointment of Law Debenture Trust Corporation as Congo's agent for service of process relating to the Loan Agreement. He submits that the question is not one of authority as between Congo and Law Debenture Trust Corporation, but one of contract between Congo and the parties to the Loan Agreement relying upon a decision to that effect of Moore-Bick J in AM International Bank plc v Republic of Zambia & Others, decided on 23rd May 1997. It is to be observed that in that case Law Debenture Trust Corporation had originally been duly appointed although Zambia had allowed the relationship to lapse, and furthermore that Law Debenture Trust Corporation did, in fact, forward the documents to Zambia upon receipt thereof. However, I am not sure that that affects Moore-Bick J's reasoning. I would be inclined to follow Moore-Bick J's approach, although I do not regard this point as determinative of the matters which I have to decide.

I should make it clear that, if I had to decide the point, I would certainly not regard

service upon an honorary consul, as opposed to a consul general, as good service under Clause 19.2. On the evidence before the court, Congo does not maintain a Consulate in London. The distinction between career consular officers and honorary consular officers is well established. Its significance is particularly well illustrated by the response of the honorary consul to the purported service upon him in this case. Thus, when served with the original process in October 2002, the honorary consul responded:

"The package received this morning regarding Kensington International Limited against the Republic of Congo should not have come to this office as we are the honorary consulate and do not have any political or financial connection with the Republic of Congo-Brazzaville. We therefore ask you kindly to collect the documents from us and forward those to His Excellency, M. Henri Lopes, Ambassade de La Republique Du Congo-Brazzaville, Ambassador for France and Great Britain, 37 Bis Rue Paul Valery, 75116, Paris, France. His Excellency Monsieur Henri

Lopes is accredited at the Court of St James of her Majesty Queen Elizabeth II government but resident in Paris."

In fact, as appears from the subsequent communication, the honorary consul did forward the package to the Congolese ambassador in Paris. When sent the documents relevant to the summary judgment application before Cresswell J, the honorary consul responded:

"The passage previously sent to the honorary consulate was in good faith sent by this office to the embassy in Paris. Another package has now been received from you, which will be returned to you. This is an honorary consulate, existing solely for the promotion of the Republic of Congo-Brazzaville in the UK. As an honorary office, there is no financial assistance received and no diplomatic bag. Consequently, there is no money available to pay for the transportation of your goods to Paris. These documents should be forwarded to an ambassador at an embassy or consul general at a consulate of the Republic of Congo and not to an honorary consulate."

The claimant has also sent documents by

DHL to what appear to be two relevant addresses in Congo. This is not contractual service, but it demonstrates that the claimant has taken steps to ensure that the defendant is aware of the proceedings, and I am satisfied that it almost certainly is so aware of the proceedings and of all the steps taken therein. The fact remains, however, that in relation to the originating process, as opposed to the judgment, the claimant did not use the diplomatic channels accorded by Section 12 (1) of the State Immunity Act 1978.

Thirdly, Mr Qureshi raised a question mark whether the claimant should properly be regarded as a lending institution to which an assignment could properly be made pursuant to Clause 16 of the Loan Agreement. I have some doubt as to what was intended to be achieved by the apparent attempt to limit the class of acceptable assignees to "any bank or lending institution". Plainly, the claimant is not in the business of lending money in the sense in which that expression is ordinarily used.

I am not sure that I can derive too much

assistance from the definition of lending in Annex 1 to the directive 2002/12/EC of the European Parliament and the Council of 20th March 2000. Under that instrument lending includes factoring which is , I think, an apt description of the claimant's business. If lending institution was intended to embrace any institution which engaged in factoring of debts, I cannot see what purpose was served by adding lending institution to bank by way of description of the permitted class of assignee. I have a feeling that it may have been intended to limit the class to regulated institutions. Again, I do not need to address this point further, and, of course, Cresswell J has inferentially decided that the assignments are valid.

Likewise, I do not need to address Mr Qureshi's observation which concerns the question whether the signatories of the Loan Agreement purportedly on behalf of the defendant had the authority to bind the state. Clause 7 of the Loan Agreement creates a condition precedent to the obligation of the lending banks in this regard. So far as

relevant, it provides for service upon the banks of a copy certified as true and correct by the Minister of Finance of the People's Republic of the Congo or by a person duly authorised by him of (1) documents evidencing the authority of the person who has executed the agreement for the borrower, including without limitation an authorisation granted by the president of the People's Republic of the Congo. Furthermore, at subclause C of Clause 7, there is a provision for the furnishing to the lenders of an opinion of the president of the Supreme Court of People's Republic of the Congo in the form of a French text corresponding substantially to an English text set out in Exhibit C. Exhibit C includes the following paragraphs:

"2. Mr Noté (several French words) is fully empowered to sign the agreement, the related agreement concerning management fee and all other documents in connection with the agreement on behalf of the People's Republic of the Congo."

There is no evidence either way as to whether this condition precedent was satisfied.

Mr McQuater says that it was exclusively for the benefit of the banks and could be waived by them. I think he is probably right, although I would regard it as very strange if compliance with this part of the clause was, in fact, waived. I have, however, already referred to other evidence from which it is appropriate to infer that Congo recognises the Loan Agreement as containing obligations binding upon it.

Mr Qureshi's fifth point is that if the injunction was granted, it might subsequently be necessary to investigate whether any creation by Congo of the status of preferential creditor amounted to what would be recognised in public international law as an act of state, which would not be justiciable before the domestic court. I agree that that is a possibility, although I note that Mr Qureshi does not suggest that the pre-financing agreements to which I have already referred or similar such commercial agreements would attract this treatment.

This point is, I think, closely allied to the seventh point, which concerns the nature of the relief sought generally, which is directed

towards the coercion of third parties rather than securing immediate compliance by the defendant. Because I regard this last point as determinative, I regard it as unnecessary to attempt any analysis of the pari passu clause. In any event, with all respect to Cresswell J, who did not have the advantage of the observations of the amicus which have been made to me, that question would be better addressed in a debate as between the original parties to an agreement in which the clause appears and, moreover, in a case where the party seeking to enforce the clause does not derive its title in substantial part from original parties who have already colluded in its apparent breach.

Mr McQuater submits that the purpose of the injunctive relief is to ensure that Congo performs its agreement. I am simply unprepared to grant such relief to a party who declines to tell the court what is the consideration given for the acquisition of the rights sought to be enforced, particularly where those rights have not been immediately acquired by the claimant from those who were originally entitled thereto, and where the relevant breaches of

agreement have, in all probability, been continuing for at least 18 years, aided and abetted by some of the original lenders and the original assigners. In these circumstances I am simply unable to conclude that equity requires the grant of such relief. Insofar as I am asked to balance hardship, I lack the material on which to conduct the exercise.

However I should make it clear that even had I been told of the consideration and, on the assumption that it is more than derisory and represents a substantial investment, I should still have declined to grant the relief claimed. The claimant already has a judgment in respect of the amount due. It is seeking relief over and above the normal mechanisms of execution. Compliance by the defendant with the injunctive relief sought can for all practical purposes be achieved only by distraint against assets of the defendant, although for the reasons which I have already given I am doubtful whether such measures could be taken against this defendant. If, however, there are available assets of the defendant against which such measures could be taken they

can equally well, indeed more appropriately, be made the subject of execution of the judgment debt.

Moreover the order which is sought, particularly paragraphs 2 and 3 thereof, would be likely to disrupt arrangements which the defendant has already made for the payment of creditors. The task of supervising compliance with any such order would be both unmanageable and invidious where the defendant against whom it is made is a foreign sovereign State. Many of the world's banks maintain offices in London. The court would potentially be asked to intervene in respect of transactions having nothing whatever to do with this jurisdiction simply upon the basis of the presence within the jurisdiction of the entity contracting with the defendant.

I do not accept that the sole consideration in deciding whether to grant such relief is the question whether compliance with the order of the court will benefit the claimant, or achieve the purpose for which it is sought.

The court is also concerned with the

question whether damages or directly available monetary relief is an adequate remedy and with the question whether there is any realistic prospect that the court can by direct action against the party enjoined enforce compliance. Mr McQuater rightly reminds me that it is not uncommon for compliance with, for example, freezing orders to be secured by service of notice upon third parties such as banks. That is of course correct, but such orders are still in a meaningful sense directed in the first instance to the defendant and are only made in cases where the court has jurisdiction over the defendant. I do not regard it as an appropriate exercise of my discretion, at any rate in the particular circumstances of this case, to make an order compliance with which can only realistically be achieved by coercion of third parties. I view with disquiet in the circumstances of this case a situation in which third parties are potentially exposed to penal consequences which could never be visited upon the defendant to whom the order is actually directed.

For all these reasons therefore in the

exercise of my discretion I decline to grant the injunctive relief sought.

It remains to consider the declaratory relief. As I indicated during the hearing I am entirely satisfied on the basis of the evidence before me that the defendant has adopted in relation to its oil exports cumbersome and apparently commercially disadvantageous and inflexible pre-financing structures with the interposition of special purpose vehicles for the very purpose of preventing its creditors seizing its oil in execution of debts owed by it.

In relation to the negative pledge the claimant eschewed any intention to attempt to unscramble past transactions. Paragraphs 2 and 3 of the draft order before the Court do by contrast attempt to prevent payments pursuant to existing arrangements save on a pari passu basis. Since I have concluded that it is inappropriate to grant that relief and since the claimant would have no wish to attempt to unscramble past security arrangements made by the defendant with its creditors I have concluded that the declaration sought would be

of no utility and that I ought in the exercise of my discretion to decline to grant it. If anything the existence of such a declaration could be positively productive of uncertainty as to the propriety of third parties acting in accordance with their existing contractual obligations.

In any event the declaration sought is I consider too unwieldy for the court to consider granting it. Simply by way of example it is unsatisfactory for the court to make declarations by reference to conduct which cannot be described more precisely than appears at paragraph 26 of the particulars of claim. Since, however, I have concluded that the declaratory relief would serve no useful purpose over and above the money judgment which the claimant has already obtained I decline to grant it.